OPINION

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No need for antitrust prosecution of Google

Putting it under a microscope for actions it might take is anathema to our system of marketplace competition.

Glenn B. Manishin All Articles

The National Law Journal | July 04, 2011

After the U.S. Department of Justice's Antitrust Division cleared the acquisition by Google Inc. of travel software developer ITA a few weeks ago, many antitrust law practitioners believed public calls for a broader antitrust investigation of Google would cease. Spokespersons for Google competitors in Internet travel search and other fields nonetheless remain undeterred, and they convinced the Federal Trade Commission to launch a formal probe in late June.

It would be a debacle of serious and long-run consequences for the federal antitrust enforcement agencies — either DOJ or the FTC — to prosecute a Sherman Act complaint against Google. Putting Google under an antitrust microscope for actions it might take in the future is anathema to our U.S. system of marketplace competition and the widely accepted limitations on antitrust intervention in the free market.

There are three basic reasons why calls for an antitrust case against Google are misplaced. First, unlike the historic AT&T and Microsoft monopolization prosecutions, which were based on plainly anti-competitive conduct taken by monopolists to squelch competition, the concerns of travel and other so-called "vertical" competitors of Google is that the search giant has what they term the "incentive and ability" to harm competition in the future. U.S. antitrust law, to the contrary, bases liability on actual practices, not the potential for future bad acts. Google is most definitely big, but in America big alone has never been bad, let alone illegal.

Second, federal antitrust prosecutors learned the hard way in the Microsoft case that seeking to extend antitrust law to the rapidly changing high-tech industry is very difficult. For instance, Microsoft was accused of "tying" its Internet Explorer Web browser to the Windows operating system, but that claim was thrown out by the courts, largely because defining what

is "exclusionary" in new markets is extraordinarily difficult and risks deterring legitimate innovations. Google says its new ITA division will yield innovative ideas for travel search and bookings; the market deserves a chance to see if Google can produce those innovations fairly.

Third, the risk of transforming U.S. antitrust enforcers from prosecutors to regulators — something all knowledgeable antitrust lawyers regard as anathema — is very substantial in the area of Internet search. Search is inherently subjective, since its object is to produce results predicted to best satisfy a user's interests. There is no objective standard against which to gauge the reliability, rank or relevance of Web sites in response to a search query. So putting Google under the antitrust lens for how it treats its own links versus so-called "organic" search results would embroil federal antitrusters in the Vietnam of Internet oversight, where ad hoc rules must be made up and the only way to "save" the search market would be to cripple the algorithms Google has used to make it the most popular search engine in the world.

That is the final point. No one can say with any seriousness that Google has captured a huge share of Web search, and search advertising, with anything other than smarter software writers and more refined product developers. It simply built a better mousetrap. The only thing that keeps Internet users returning to Google — which unlike AT&T or Microsoft has no technological means to lock consumers into its site or services — is running faster than its competitors. Antitrust law should intervene in that race only if Google acts to trip a competitor — if it cheats.

There is ample time to enforce the antitrust laws against Google in the future if it does something exclusionary like that. In the meantime, a decision to regulate Internet search in America is one that should be made, if at all, by our legislators and policymakers, not antitrust lawyers and federal courts.

Glenn B. Manishin is a partner at Duane Morris. He was counsel to MCI in the AT&T antitrust case and served as a principal lawyer for ProComp (a group of Microsoft's largest competitors, including AOL, Oracle and Sun Microsystems) and several software trade associations in the Microsoft antitrust case. Neither Manishin nor his law firm represents Google.

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